

JUL 19 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

MICHAEL B. KLAPPER; SUMMER
KLAPPER, a minor by and through her
Guardian ad Litem, Michael B. Klapper,

Plaintiffs - Appellants,

v.

CITY OF LOS ANGELES; ERNEST
AVILA; ANIBAL LOPEZ, Officer #31232;
GREGORY TREJO, Officer #33641;
GUSTAVO BARRIENTOS, Officer #31631;
CUSTODIO PONCE, Officer #27071;
ALONSO RAMIREZ, Officer #31010;
STEVEN CORNELL, Officer #30504,

Defendants - Appellees.

No. 04-55106

D.C. No. CV-02-02206-RGK

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted October 18, 2005
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to
or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: FRIEDMAN,** O'SCANNLAIN, and PAEZ, Circuit Judges.

Michael Klapper appeals from the district court's grant of summary judgment in his civil rights suit against the city of Los Angeles and several Los Angeles police officers, and the denial of his motion to amend his complaint. The facts are familiar to the parties and will not be repeated here.

We view the facts in the light most favorable to Klapper, *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002), and conclude that there are critical factual issues that preclude us from determining whether officers had probable cause to enter his apartment. If, as Klapper argues, officers could not see Klapper clearly before they ordered him to open the exterior door to his apartment, they violated the Fourth Amendment by searching his apartment without probable cause. *See United States v. Winsor*, 846 F.2d 1569, 1573 (9th Cir. 1988) (en banc) (holding that officers conduct a search when they “gain[] visual entry into [a] room through [a] door that [is] opened at their command”). Because resolution of this factual issue affects whether officers had probable cause to arrest Klapper, summary judgment was not appropriate.

** Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

Nevertheless, the district court also grounded its decision on qualified immunity grounds; “[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” *Saucier v. Katz*, 533 U.S. 194, 202 (2001). The rule of *Winsor*, however, is clearly established, and we cannot decide whether officers were entitled to qualified immunity before resolution of the factual issue above.

With respect to Klapper’s motion for leave to amend his complaint, the district court based its denial on findings of undue delay and prejudice. The City of Los Angeles and the officers filed a non-opposition to Klapper’s motion “after reviewing the relevant case law and observing and acknowledging the liberal standards governing amendments.” By doing so, they implicitly conceded that permitting Klapper to amend his complaint would not prejudice them. The district court therefore erred by finding prejudice, and delay alone is insufficient to justify denial of leave to amend. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Thus, it was an abuse of discretion to deny Klapper leave to amend his complaint.

REVERSED AND REMANDED.